No. 14-378

IN THE

Supreme Court of the United States

STEPHEN DOMINICK MCFADDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, to convict a defendant of distribution of a controlled substance analogue, the government must prove that the defendant knew that the substance constituted a controlled substance analogue.

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BRIEF FOR THE PETITIONER

Petitioner Stephen Dominick McFadden respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-27a) is published at 753 F.3d 432. The district court's opinion (Pet. App. 44a-68a) is unpublished, but available at 2013 WL 8339005.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2014. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on June 17, 2014. Pet. App. 69a. On August 21, 2014, the Chief Justice extended the time to file this petition through October 14, 2014. No. 14A199. A petition was filed on October 2, 2014. This Court granted certiorari on January 16, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 841(a) of Title 21 provides in relevant part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

Section 813 of Title 21 provides:

A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.

Section 802(32) of Title 21 provides:

(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance –

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.

(C) Such term does not include –

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

STATEMENT OF THE CASE

Americans consume all manner of products advertised as boosting energy, relieving stress, or having other desired effects on the user's mind and body. Some – including dietary supplements, energy drinks, homeopathic remedies, and aromatherapy products – are subject to only minimal regulation by the federal government. Others are strictly illegal, banned as controlled substances by federal law.

Most of the time, it is easy enough to determine which is which: the Government issues schedules of controlled substances and makes them available on the internet. But federal law also criminalizes "knowing or intentional" possession and distribution of controlled substance "analogues,"[1] defined to include substances that are "substantially similar" in chemical structure and effect to certain scheduled controlled substances.[2] Given this definition, simply knowing that a dietary supplement or energy drink contains "thiamine hydrochloride," "didehydroepiandrosterone," or "phenethylamine" tells the ordinary person next to nothing about its legality.[3] When the Government wants to know

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[1] *See* 21 U.S.C. §§ 813, 841(a), 844.

[2] *See id.* § 802(32)(A).

[3] Thiamine hydrochloride is a common and entirely legal food additive. Didehydroepiandrosterone is a legal nutritional supplement. Phenethylamine is a substance the Government has alleged to be an analogue in a handful of prosecutions, *see, e.g.*, *McKinney v. United States*, 221 F.3d 1343 (8th Cir. 2000) (unpublished table decision), but which its expert in this case testified is not an analogue, *see* C.A. J.A. 424.

whether something is an analogue, it asks a team of scientists at the Drug Enforcement Agency (DEA). While the DEA maintains a running list of what it considers to be analogues, it keeps that list a secret. *See* J.A. 58.

The question in this case is whether someone who is *not* a scientist, and who genuinely does not know that the DEA considers a product he is distributing to meet the statutory definition of an analogue, has committed a federal drug felony. The Fourth Circuit held that he has, so long as he intended his products for human consumption.

I. Legal Background

The Controlled Substances Act (CSA), criminalizes "knowingly or intentionally" possessing, manufacturing, distributing, or dispensing "a controlled substance." 21 U.S.C. §§ 841(a), 844 The statute defines a "controlled substance" as a substance listed on schedules described in the statute, as those schedules may be amended by the Attorney General through notice-and-comment rulemaking. *See* 21 U.S.C. §§ 802(6), 811-812. To prove a criminal violation, the Government must show that the defendant knew that the substance he possessed or sold was a controlled substance. *See, e.g.*, *United States v. Turcotte*, 405 F.3d 515, 525 (7th Cir. 2005) (collecting citations). Illegal distribution of a schedule I controlled substance is punishable by up to twenty years' imprisonment (or, if death or substantial bodily injury results, a mandatory minimum sentence of twenty years and up to life imprisonment). *Id.* § 841(b)(1)(C).

It is not difficult for someone to determine whether a particular substance is a controlled

substance. The controlled substance schedules are published in the Code of Federal Regulations and available on the DEA's website. *See* 21 C.F.R. §§ 1308.11-1308.15; Office of Diversion Control, Drug Enforcement Admin., *Lists of: Scheduling Actions[,] Controlled Substances[,] Regulated Chemicals* (2014), *available at* http://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf.

In 1984, Congress became concerned about the emergence of so-called "designer drugs," created by clandestine chemists to mimic the effect of controlled substances while evading the Controlled Substances Act. *See Touby v. United States*, 500 U.S. 160, 163 (1991). In response, Congress gave the Attorney General emergency authority to add new substances to schedule I on an expedited basis whenever he finds that doing so "is necessary to avoid an imminent hazard to the public safety." 21 U.S.C. § 811(h)(1).

While the Attorney General's emergency scheduling authority proved "very effective[] to address much of the designer drug problem," the DEA "found a very small number of illicit chemists have been very carefully developing new drugs to stay ahead of DEA's scheduling actions." H.R. Rep. No. 99-848, pt.1, at 4-5 (1986) (House Report). To permit the Government to "investigate and prosecute these chemists for their new discoveries prior to formal control of the drugs," *id.* at 5, Congress enacted the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), Pub. L. No. 99-570, tit. I, § 1202, 100 Stat. 3207-13.

The new statute provided that a "controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of

any Federal law as a controlled substance in schedule I." 21 U.S.C. § 813. As relevant here, a "controlled substance analogue" is defined as a substance:

> (i) the chemical structure of which is *substantially similar* to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is *substantially similar* to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is *substantially similar* to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. § 802(32)(A) (emphasis added).[4]

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[4] The definition also sets out certain exclusions that are not relevant to this case. *See* 21 U.S.C. § 802(32)(B)-(C). Although the statute is confusingly worded, the "vast majority of federal courts" construe it to require the government to satisfy subsection (i) *and* either subsection (ii) or (iii). Pet. App. 47a n.2 (quoting *Turcotte*, 405 U.S. at 522 (collecting citations)) (internal quotation marks omitted).

The statute contains no definition of "substantially similar." Nor did Congress require the DEA to issue regulations elaborating the statutory definition or to compile a list of what the agency believed to fall within the definition of an analogue. And, in fact, although the DEA maintains such a list, it keeps the list confidential. *See* J.A. 58; *United States v. Nashash*, No. 12-CR-778, 2014 WL 169743 (S.D.N.Y. Jan. 15, 2014) (Government claimed privilege against disclosure of DEA documentation regarding analogue determinations).

Thus, a "substance's legal status as a controlled substance analogue is not a fact that a defendant can know conclusively *ex ante*; it is a fact that the jury must find at trial." *United States v. Turcotte*, 405 F.3d 515, 526 (7th Cir. 2005). Generally, to decide whether something is "substantially similar" to a scheduled controlled substance, juries must resolve the conflicting claims of expert witnesses on complex matters of scientific methodology, chemistry, and biology. *See, e.g., United States v. Brown*, 415 F.3d 1257, 1261-63 (11th Cir. 2005) (describing relevant testimony in one trial).

Because a substance's status as an analogue is a question of fact under the statute, a jury's decision whether a substance is an analogue is binding authority for that case and that case alone. Which is to say, it is binding only on the *defendant*: a determination that a particular substance is *not* an analogue does not bar the Government in future cases from prosecuting others for possessing or selling the product.

II. Factual And Procedural Background

1. In 2007, petitioner, an employee of a construction company, began operating a small business on the side buying overstocked items and reselling them on the internet. *See* C.A. J.A. 634, 814, 842.[5] In early 2011, he noticed that a variety of businesses in his Staten Island neighborhood were openly selling products referred to as "bath salts" which, when burned as aroma therapy products, had a stimulant effect. *See id.* 633-37, 842-44.

The term "bath salts" is used loosely to describe a range of products containing a varying list of compounds.[6] Until the DEA exercised its emergency scheduling authority in 2011, the most common ingredients were not included on federal controlled substances schedules. *See* Pet. App. 6a n.2, 45a n.1. Even after that action, some products marketed as bath salts contained active ingredients that were not scheduled controlled substances. *See id.* 6a & n.2.

Prior to selling bath salts himself, petitioner investigated the legal status of the particular substances he intended to market. On the advice of his brother, a Federal Immigration and Customs

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[5] Because the trial transcript is not consecutively paginated, this brief will refer to the transcript by reference to the page numbers in the Joint Appendix filed with the court of appeals and available on Pacer at Docket No. 19.

[6] *See, e.g.*, Melanie Haiken, *'Bath Salts' a Deadly New Drug with a Deceptively Innocent Name*, Forbes (June 4, 2012, 4:13 PM), http://www.forbes.com/sites/melaniehaiken/2012/06/04/bath-salts-a-deadly-new-drug-with-a-deceptively-innocent-name/.

Enforcement officer, petitioner examined the list of controlled substances on the DEA's website. *See* C.A. J.A. 633, 635, 638-39, 844-46. Finding nothing to indicate that the substances he intended to sell were illegal, petitioner began selling several varieties of bath salt mixtures containing various ingredients. *See id.* 634-39, 846-47. When the Government later listed two of the compounds in some of his products on the controlled substances schedule, petitioner flushed his supply of the affected products down the toilet. *See id.* 640-41. When an undercover DEA agent subsequently attempted to purchase the banned substances from him, petitioner refused on the ground that they were illegal. *See id.* 847-50.

2. Nevertheless, in November 2012, a grand jury indicted petitioner for distributing, and conspiring to distribute, products containing 4-methylethyl-cathinone, 3,4-methylenedioxypyro-valerone, and/or 3,4-methylenedioxymethcathinone. Pet. App 5a-6a. During the relevant time periods, none of these substances was listed as a controlled substance. *Id.* 6a n.2, 45a & n.1. The Government nonetheless insisted that these compounds were substantially similar to controlled substances, and therefore that petitioner had committed a criminal violation of the Analogue Act.

The ensuing "four-day jury trial focused primarily on the issue [of] whether" the chemicals at issue "constitute[d] controlled substance analogues." Pet. App. 7a. The jury heard from competing expert witnesses, including a chemist, a drug science specialist, and a pharmacist. *Id.* 7a-8a. The testimony was complex. For example, the Government called Dr. Thomas DiBerardino, a DEA

chemist, as an expert witness to establish the structural similarity of 3,4-methylenedioxypyrovalerone ("MDPV" for short) to methcathinone (a controlled substance). Dr. DiBerardino stated that he began his analysis by observing that the "core chemical structure" of the alleged analogue was phenethylamine. C.A. J.A. 422. Some controlled substances, including methcathinone, have a phenethylamine core. *Id.* 423-24. But that, he acknowledged, was not proof that MDPV is an analogue. "Phenethylamine in itself is not controlled," he explained. *Id.* 424. And there are "probably thousands of compounds that share that core, but that does not make them analogues." *Id.* 453; *see also id.* 452 (giving example of sassafras, used to flavor root beer); *id.* 456 ("decongestants" and "weight loss drugs").

Dr. DiBerardino then attempted to explain why he thought that the "substitutions" made to the phenethylamine core molecule by the alleged analogue MDPV were more similar to the substitutions required to make methcathinone than to the kinds of substitutions that would create a perfectly lawful chemical:

> Now, see, MDPV, this compound has the same core chemical structure. I don't want to – I'm not trying to confuse anybody here, but I need to say that it reflects what's in the schedules. That is, it's substituted what we call alkyl groups. They're a certain kind of chemical moiety. It's also substituted what we call ethers, another type of chemical moiety. Those are found throughout the Controlled Substances Act, those kind of

> substitutions, on this particular core. So there is remnants of what's controlled and these additions or subtractions, whatever you have, are reflective of what's controlled.

C.A. J.A. 426-27. In contrast, he testified, he would be "very uncomfortable in calling this an analogue" if a substance "add[ed] an extra carbon atom between the ring and the nitrogen," *id.* 431, or if the changes had involved "aromatic" rather than "alkyl groups," *id.* 432.

Under cross-examination, Dr. DiBerardino admitted that the critical distinction he drew between substitutions involving alkyl groups and aromatic groups was "not found in the statute." *Id.* 454. Moreover, he acknowledged that there is no "scientifically commonly understood definition [of] substantially similar." *Id.* 455.

Petitioner's expert, Dr. Matthew Lee, agreed that there is no "medical or scientific definition of substantially similar." *Id.* 523-24. Saying that a change between two chemicals is "minor" or "substantial" does not "mean anything in science," in part because there are many *aspects* in which chemical structures may be similar or different. *Id.* 524. Nor is there any consensus on a methodology for making such comparisons, he explained. For example, Dr. DiBerardino elected to compare molecular structure using two-dimensional schematics. *Id.* 525. But that, Dr. Lee noted, is "the equivalent of taking an orange and superimposing it on a frisbee" then claiming them to be substantially similar in structure because they both form circles. *Id.* 525. And it ignores the critical effects a molecule's

three-dimensional shape may have on the human body. *Id.* 525-26.[7]

Of course, prior to trial petitioner was unaware of any of this. In the end, the Government presented no evidence that petitioner knew the chemical structure – in two or three dimensions – of any of the ingredients in the products he was selling. Nor did it claim that petitioner, an employee in a construction company, had the experience or training to know which differences in chemical structure were material, much less whether, in light of those differences, his products were "substantially similar" to a controlled substance. Instead, the most the Government was able to show was that petitioner had, in a series of recorded telephone calls with a DEA informant and emails with others, compared the *effect* of his mixtures to methamphetamine or cocaine, without making any representations regarding their chemical structure. J.A. 60-96.[8]

At the close of evidence, the district court rejected petitioner's request that the jury be instructed that the Government was required to

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[7] There also was disagreement between the experts regarding the methodology for evaluating substantial similarity in pharmacological effect. *See, e.g.*, C.A. J.A. 530-33 (Dr. Lee's criticism of DEA expert's use of "structure activity relationship analysis" to predict (rather than determine) that one of the alleged analogues would have a substantially similar effect to a controlled substance).

[8] Notably, in none of the calls did petitioner represent that the purported effects were caused by the inclusion in the mixture of the substances charged in the indictment (as opposed to other active ingredients in the mixtures). *See* J.A. 60-96.

prove that petitioner knew, or was willfully blind to the fact, that the substances he distributed were analogues – *i.e*, that they had a chemical structure and an actual, intended, or claimed effect substantially similar to a schedule I or II controlled substance. *See* J.A. 30-31. Instead, over petitioner's objection, the court gave a jury instruction under which the only state of mind requirement relating to the nature of the substance was that petitioner "intended for the mixture or substance to be consumed by humans." *Id.* 40.[9] The jury convicted and petitioner appealed. Pet. App. 2a, 46a.

3. The Fourth Circuit affirmed. Pet. App. 2a. The court concluded that under its prior decision in *United States v. Klecker*, 348 F.3d 69 (4th Cir. 2003),

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[9] Specifically, the court instructed the jury that it must find:

> FIRST: That the defendant knowingly and intentionally distributed a mixture or substance that has an actual, intended, or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act;
>
> SECOND: That the chemical structure of the mixture or substance is substantially similar to the chemical structure of a controlled substance in Schedule I or II of the Controlled Substances Act; AND
>
> THIRD: That the defendant intended for the mixture or substance to be consumed by humans.

J.A. 40. The court gave a materially identical instruction in the conspiracy charge. *See id.* 33-34.

the only "scienter requirement" for an Analogue Act conviction is "that the defendant intended that the substance at issue be consumed by humans." *Id.* 21a-22a. As a consequence, the court reaffirmed, "the Act may be applied to a defendant who lacks actual notice that the substance at issue could be a controlled substance analogue." *Id.*[10]

4. The Fourth Circuit subsequently denied a timely petition for rehearing. Pet. App. 69a.

5. This Court granted certiorari.

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[10] The court also rejected petitioner's other claims on appeal, including his argument that the statute was unconstitutionally vague as applied to him in this case. Pet. App. 9a-16a.

SUMMARY OF ARGUMENT

I. The district court erred in instructing the jury that the only mens rea required for a criminal violation of the Analogue Act is an intent that the alleged analogue be consumed by humans.

The Analogue Act declares that "a controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. § 813. Federal law, in turn, criminalizes "knowingly or intentionally" possessing or distributing controlled substances. *Id.* §§ 841(a), 844. It is uniformly accepted that this means that someone prosecuted for selling methamphetamines must have known he was selling (or intended to sell) a controlled substance. It follows that when the Government charges instead that the defendant was selling a methamphetamine analogue, the Government must prove that the defendant knew he was selling (or intended to sell) a controlled substance analogue.

The Fourth Circuit's contrary conclusion flies in the face of the text and runs counter to tradition. Courts are reluctant to construe a statute to establish a strict liability crime. They presume instead that a statute (particularly a statute with an express mens rea element) requires the prosecution to establish that the defendant knew the facts that made his conduct illegal. Yet the Fourth Circuit's interpretation requires no such knowledge and effectively reads the Analogue Act to create a strict liability offense.

The Government's principal objection to a traditional construction of the Analogue Act is

practical – such a reading allegedly would make it too hard to convict everyone the Government would like to prosecute under the statute. But the Government itself emphasizes that the principal focus of the statute was the clandestine chemists who design analogues. And it does not deny that it can easily establish that these chemists know that their drugs are substantially similar to controlled substances, since that is the whole point of creating them.

So the Government is reduced to objecting that it may be difficult to show that someone like petitioner knows that what he is selling is substantially similar to a controlled substance. But the Government routinely convicts "street-level dealers" in jurisdictions requiring mens rea. Moreover, there are a number of simple steps the Government can take to enhance public safety and facilitate prosecutions. For example, when the Government encounters someone like petitioner openly selling a product on the internet or in a store, it can immediately inform him that the substance is an analogue, seize the entire stock of the product (since the drug forfeiture statute has no mens rea element), and then prosecute the person if he tries to sell the substance again (at which point the jury can easily infer the defendant's knowledge).

II. The district court further erred in refusing to give petitioner's proposed instruction on what it means to knowingly or intentionally distribute an analogue.

Under a "conventional mens rea" requirement, to knowingly or intentionally possess or distribute an illegal object, the defendant "must know the facts that make his conduct illegal." *Staples v. United*

States, 511 U.S. 600, 619 (1994). For example, a defendant knowingly owns a "machine gun" only if he knows that the rifle he purchased has the features required by the statutory definition of that term (*e.g.*, fires multiple rounds on a single pull of the trigger). He does not knowingly own a machine gun if he simply knows he owns a rifle, but honestly thinks it fires a single round per trigger pull. *Id.* at 615, 619.

Likewise, the conventional mens rea element incorporated by the Analogue Act requires that the defendant must know that the substance he is possessing or distributing has the characteristics that make it an analogue under the statutory definition – *i.e.*, that it is substantially similar in structure and effect to a controlled substance.

III. Absent such a mens rea element, the Analogue Act would be unconstitutionally vague as applied to petitioner and others like him.

The Due Process Clause requires Congress to define criminal conduct in a way that permits ordinary citizens to know their legal obligations and conform their conduct to the law. But the Analogue Act's "substantially similar" standard makes that all but impossible for someone like petitioner. First, it defines criminal conduct by reference to information (*e.g.*, the structure and effect of chemicals) that is inaccessible to ordinary people. Second, even if someone can figure out the chemical structure and effect of an alleged analogue, he is left to guess whether the inevitable combination of similarities and differences amount to substantial similarity under the Act. Nothing in the statute, regulations, common law, or any other legal source provides the answer. Nor does the term have any established

meaning in science. As a consequence, even scientists – including scientists within the DEA itself – regularly disagree about how to evaluate alleged analogues and whether particular substances meet the vague statutory definition.

The result is uncertainty and arbitrariness. The only way to know for certain whether a particular substance is an illegal analogue is to get prosecuted for selling it and then see how a jury resolves the inevitable battle of scientific experts (whose testimony the jury may not even be able to understand). And even that will not provide any guidance for the future, as the jury's verdict has no binding effect in later prosecutions.

The only hope for salvaging the statute is by limiting its application to those defendants – like clandestine chemists – who despite these odds actually know (or are willfully blind to the fact) that they are making, possessing, or selling a product that is substantially similar to a controlled substance in chemical structure and effect. Imposing that mens rea requirement allows conviction of those for whom the statute is not impermissibly vague while precluding its application to those denied fair notice of what the law prohibits.

ARGUMENT

I. To Obtain A Criminal Conviction Under The Analogue Act, The Government Must Prove The Defendant Knew The Substance He Possessed Or Distributed Was A Controlled Substance Analogue.

On the Fourth Circuit's interpretation of the Analogue Act, one need know nothing about the content of a substance before being subject to up to 20 years imprisonment for selling what turns out to be a controlled substance analogue. All the Government must prove is that the defendant intended the product containing the alleged analogue to be consumed by another person. Pet. App. 21a. Thus, someone who sells dietary supplements from her home is rendered a federal drug trafficking felon if her supplier includes in the pills even small amounts of what a jury subsequently decides is an analogue. Indeed, the customer who purchases them could be prosecuted for possession of a schedule I controlled substance. *See* 21 U.S.C. § 844. The same would be true of a party host who unwittingly serves punch someone else spiked with an ecstasy analogue, and the guests who consume it.

Of course, one might hope prosecutors would exercise reasonable judgment before bringing such charges (although such hope can sometimes lead to disappointment, *see, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2085 (2014)). But this Court does not lightly conclude that Congress intended to leave the populace to the mercy of prosecutors' discretion by omitting any meaningful mens rea element from a criminal statute. And here the text demonstrates that Congress intended the Analogue Act to

incorporate the traditional mens rea requirement expressly imposed in ordinary controlled substance cases – *i.e.*, that the Government must prove the defendant knew that the substance he sold or possessed was a controlled substance analogue.

A. The Plain Text Of The Analogue Act Requires The Government To Prove The Defendant Knew He Was Possessing Or Distributing An Analogue.

1. The Analogue Act itself does not directly criminalize anything. Instead, it defines a "controlled substance analogue," 21 U.S.C. § 802(32), and then directs that analogues "shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I," *id.* § 813.

Federal law, in turn, does not criminalize all possession or sale of schedule I controlled substances. Instead, the relevant provisions declare that it "shall be unlawful for any person *knowingly or intentionally* to possess a controlled substance," *id.* § 844(a) (emphasis added), or "*knowingly or intentionally* to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," *id.* §841(a) (emphasis added).

Both before and after the Analogue Act was passed, it was settled that to knowingly or intentionally distribute a controlled substance like cocaine, the defendant "must know that the substance in question is a controlled substance," that

is, that the substance "was some kind of prohibited drug." *United States v. Turcotte*, 405 F.3d 515, 525 (7th Cir. 2005).[11]

That settled authority is correct. "As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009). This is particularly true with respect to a provision, like this one, which criminalizes possession of a particular kind of object. "In ordinary English," the Court has explained, "where a transitive verb has an object, listeners in most contexts assume that an

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[11] *See, e.g.*, *United States v. Hussein*, 351 F.3d 9, 19-20 (1st Cir. 2003); *United States v. Kairouz*, 751 F.2d 467, 469 (1st Cir. 1985); *United States v. Roberts*, 363 F.3d 118, 123 & n.1 (2d Cir. 2004); *United States v. Morales*, 577 F.2d 769, 775-76 (2d Cir. 1978); *United States v. Barbosa*, 271 F.3d 438, 458 (3d Cir. 2001); *United States v. Ali*, 735 F.3d 176, 186-87 (4th Cir. 2013); *United States v. Gamez-Gonzalez*, 319 F.3d 695, 699-700 (5th Cir. 2003); *United States v. Gonzalez*, 700 F.2d 196, 200 (5th Cir. 1983); *United States v. Pope*, 561 F.2d 663, 670 (6th Cir. 1977); *United States v. Serrano-Lopez*, 366 F.3d 628, 634 (8th Cir. 2004); *United States v. Ramirez-Ramirez*, 875 F.2d 772, 774 (9th Cir. 1989); *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir. 1976) (en banc); *United States v. Castorena-Jaime*, 285 F.3d 916, 933 (10th Cir. 2002); *United States v. Lewis*, 676 F.2d 508, 512 (11th Cir. 1982).

Under this standard, it is not necessary that the defendant "know the *type* of controlled substance he possesses." *Turcotte*, 405 F.3d at 525 (emphasis added) (citation omitted). But he must know that the substance he possesses is *a* controlled substance. *Id.* So someone who believes he is selling ecstasy, but is really selling methamphetamines, nonetheless has the required mens rea.

adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Id.* Thus, a statute that prohibits knowing possession of the "means of identification of another person" requires the Government to prove that the defendant not only intentionally possessed *something*, but that he knew that the thing was a means of identification and that it belonged to another person. *Id.* at 657.

For the same reason, to prosecute someone for knowingly or intentionally distributing a controlled substance, the Government must prove that the defendant knew that her dietary supplement or party beverage contained a controlled substance. And if analogues are to be treated "as a controlled substance," 21 U.S.C. § 813, the same must be true if the supplement or beverage contains a controlled substance *analogue*. That is, the Government must show that the defendant knew he was selling a controlled substance analogue.

2. The Fourth Circuit's and the Government's contrary interpretations of the text are unconvincing.

a. In *United States v. Klecker*, 348 F.3d 69 (4th Cir. 2003), the Fourth Circuit pointed out that Section 813 contains a mental state requirement, treating analogues as controlled substances only to the extent intended for human consumption. *Id.* at 71. The court seemingly concluded from that fact that Congress meant to relieve the Government of the burden of proving anything else about the defendant's mental state regarding the nature of the substance. *Id.* at 72; Pet. App. 21a.

But that does not follow. Criminal statutes frequently impose mens rea requirements with respect to multiple elements. *See, e.g.*, *Flores-Figueroa*, 556 U.S. at 654; *Staples v. United States*, 511 U.S. 600, 609 (1994). Here, intent for human consumption is simply a requirement for an analogue to be treated as a controlled substance; it says nothing about the mental state required to make possession or sale of analogues or controlled substances illegal. That is addressed elsewhere, in provisions that impose additional intent requirements.

Any contrary inference is decisively rebutted by the plain text of Section 813. Excusing the Government from proving that the defendant knew the nature of the illegal substance he was selling if the substance is an analogue, but not if it is a scheduled controlled substance, would be the opposite of treating analogues "as a controlled substance in schedule I." 21 U.S.C. § 813.

The legislative history confirms that the "intended for human consumption" element was added "to protect legitimate scientific research," not to ease prosecutions. S. Rep. No. 99-196, at 4 (1985) (Senate Report). The requirement makes absolutely clear that the statute is inapplicable to "chemists whose laboratory activity is directed solely toward producing industrial chemicals," *id.*, or those engaged in early stage drug research prior to obtaining FDA approval for clinical trials on humans, House Report at 8.

b. The Government, for its part, has argued that a "[d]irect and literal application of the scienter requirement" of Section 841 to analogue cases would

be "nonsensical." BIO 12-13 (citation and internal quotation marks omitted). That is, "applying the standard requirement that a defendant must know the substance in question is a 'controlled substance' is nonsensical since controlled substance analogues are, by definition, not 'controlled substances.'" *Id.* (quoting *Turcotte*, 405 F.3d at 72) (internal quotation marks omitted).

That argument is itself pure nonsense. Congress obviously intended that analogues be treated as controlled substances in the sense that wherever the statute refers to "controlled substance" it must be understood also to refer to analogues. Or, put another way, Congress directed that analogues be treated as falling within the definition of a "controlled substance." Thus, in an analogue case, the Government proves that a defendant knew he was selling a controlled substance by proving that he knew he was selling a controlled substance analogue.

It is the Government's contrary reading that would render the Analogue Act incoherent. If the Solicitor General is right that an analogue is not a "controlled substance" for purposes of Section 841's mens rea requirement, it follows that an analogue is not a controlled substance for purposes of criminalizing its possession or distribution either. And that would mean that the Analogue Act failed to accomplish anything at all.

B. The Text Is Reinforced By Legal Tradition.

A straightforward reading of the text also aligns the statute with the legal traditions against which it was drafted.

1. Courts "must construe [a] statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples*, 511 U.S. at 605 (citation omitted). Accordingly, courts have a "generally inhospitable attitude" to claims that a statute has dispensed with any meaningful mens rea element. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

Thus, even when a statute is silent as to mens rea, in the absence of convincing evidence Congress intended to create a strict liability crime, courts will read into the statute such mens rea element as "is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 225, 269 (2000) (citation omitted). Ordinarily that means implying a "conventional mens rea element," which "require[s] that the defendant know the facts that make his conduct illegal." *Staples*, 511 U.S. at 605; *see also id.* at 619 (applying the "usual presumption" that "a defendant must know the facts that make his conduct illegal").

Moreover, when a statute *does* contain an express mens rea requirement, it is presumed to apply to all the factual elements of the offense. *See, e.g.*, *Flores-Figueroa*, 556 U.S. at 650 ("[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."); *id.* at 660 (Alito, J., concurring in part and concurring in the judgment) ("In interpreting a criminal statute such as the one before us, I think it is fair to begin

with a general presumption that the specified *mens rea* applies to all the elements of an offense. ").[12] Thus, like a statute with an implied mens rea element, a statute that expressly criminalizes only knowing conduct requires the Government to prove that the defendant "must have had knowledge of the facts, though not necessarily the law, that made" his conduct illegal. *Morissette v. United States*, 342 U.S. 246, 271 (1952); *see also Dixon v. United States*, 548 U.S. 1, 5 (2006); *Bryan v. United States*, 524 U.S. 184, 193 (1998); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 722 (1995) (Scalia, J., dissenting); *United States v. Intn'l Minerals & Chem. Corp.*, 402 U.S. 558, 560, 563-64 (1972); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952)

Finally, Congress enacted the statute against the background principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

2. The Fourth Circuit's interpretation runs against the grain of all of these traditions. It declines to extend Section 844(a)'s express mens rea element to the essential fact – the nature of the substance – that makes the defendant's conduct unlawful. And in

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[12] *Accord* Model Penal Code § 2.02(4) (1981) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.").

the process, it effectively renders Analogue Act violations strict liability crimes.

To be sure, the court retained a stub of a mens rea element in its "intended for human consumption" requirement. But this Court has applied the presumption against strict liability statutes in similar circumstances. *See Staples*, 511 U.S. at 607 (applying presumption to reject reading of gun control statute that would have required only that the defendant knew he possessed a gun, but not that the gun possessed the features required to make its possession illegal); *id.* at 607 n.3 (collecting other examples of presumption being applied to statutes with nominal, but unconstraining, mens rea elements).

The Fourth Circuit pointed to nothing in the statute sufficient to overcome these traditional presumptions or the rule of lenity. Any assertion that Congress intended no meaningful mens rea element is particularly unpersuasive given that Congress expressly included a conventional mens rea element for ordinary controlled substances and commanded that analogues be treated the same.[13] The Fourth Circuit does not even speculate why

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[13] For that reason, the Analogue Act is distinguishable from the drug-related tax statute the Court considered in *United States v. Balint*, 258 U.S. 250 (1922). In that case, this Court construed a law without an express mens rea element to establish a strict liability "public welfare offense." *Id.* at 252-54. In addition to having an express mens rea requirement, the harsh penalties applied to analogue offenses belie any suggestion that the Analogue Act was intended to create a strict liability public welfare offense. *See Staples*, 511 U.S. at 616-18.

Congress would have intended to imprison someone who unwittingly distributed brownies containing a marijuana analogue, but not brownies containing marijuana itself.

C. Reading The Statute To Encompass A Traditional Mens Rea Requirement Does Not Conflict With The Statute's Purpose.

To its credit, the Government has at least attempted an answer, claiming that proving intent in an analogue case is too hard and would therefore frustrate the statute's basic purposes. *See* BIO 13-17. "Of course, the purpose of every statute would be 'obstructed' by requiring a finding of intent if we assume that it had a purpose to convict without it." *Morissette*, 342 U.S. at 259. And in this case, nothing in the general purposes of the Analogue Act overcomes the plain indications in the text that Congress did not intend to facilitate prosecutions by forgoing any meaningful intent requirement.

1. Initially, the Government does not, and cannot, claim that it has had any difficulty proving the mens rea of the clandestine chemists, and their employers, who were the principal targets of the legislation.

The Government has acknowledged, and the legislative history overwhelming confirms, that "Congress enacted the Analogue Act to prevent underground chemists from altering illegal drugs in order to create new drugs that are similar to their precursors in effect but are not subject to the restrictions imposed on controlled substances." BIO 13-14 (citation and internal quotation marks omitted). Thus, the House Report's complete

description of the "Purpose of the Legislation" was that "[t]his bill will enable the Drug Enforcement Administration to investigate and prosecute *clandestine chemists* who develop subtle chemical variations of controlled substances (called analogues or 'designer drugs') for illicit distribution and abuse." House Report 2 (emphasis added); *see also id.* ("The legislation is designed both to enable swift investigation and prosecution of *illicit drug designers* and to fully protect the interests of legitimate scientific investigation into the properties of drugs that may have important therapeutic potential.") (emphasis added). After summarizing the hearing testimony, the Report concluded that the "only way to effectively protect the public is to investigate and prosecute *these chemists* for their new discoveries prior to formal control of the drugs." *Id.* 5 (emphasis added). The Senate Report likewise explained that the "Need for Legislation" arose from "loopholes that enable *underground chemists* to evade our Nation's drug laws." Senate Report 1 (emphasis added). And both reports are replete with references to "basement chemists,"[14] "unscrupulous chemists,"[15] "dangerous chemists,"[16] "illicit chemists,"[17] and "[m]akers of designer drugs."[18] Conversely, consistent with the focus on chemists, several exemptions were added to

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[14] Senate Report 3.

[15] *Id.* 5.

[16] *Id.*

[17] House Report 5.

[18] *Id.* 4.

the statute to protect legitimate drug researchers. *See* 21 U.S.C. § 802(32)(C)(ii)-(iii); House Report 8-9.

The mens rea requirement written in the statute aligns perfectly with the principal targets of the statute. Those who create analogues by making slight chemical alterations to controlled substances obviously are aware of their substantial similarity in structure and effect to illegal drugs, as are those who employ them to do that work.

2. The Government nonetheless argues that the Fourth Circuit's minimal mens rea element is necessary to facilitate convictions of "street-level dealers" who may not know the precise nature of what they are selling, or may even be lied to by their suppliers in order to shield them from liability. BIO 14-15. But that objection is unfounded as well.

To start, the same could be argued of ordinary controlled substances. That is, some street-level dealers may not know the true nature of what they are selling, and their suppliers may intentionally keep them in the dark. For example, the DEA has now placed on the controlled substance schedules several ingredients found in many bath salts, including all of the substances for which petitioner was prosecuted under the Analogue Act.[19] Accordingly, were the Government to prosecute petitioner (or someone like him) for selling bath salts containing the same substances today, it would have to prove that he knew he was selling a controlled substance, despite the possibility that he might not

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[19] *See* Pet. App. 6a n.2; 79 Fed. Reg. 12928 (March 7, 2014) (emergency scheduling of 4-methyl-n-ethylcathinone).

know the ingredients in his products or was lied to by his supplier. *See, e.g.*, *United States v. Ali*, 735 F.3d 176, 186-87 (4th Cir. 2013). Congress presumably understood that including a conventional mens rea requirement in Section 844(a) would make it harder for the Government to secure convictions of those who did not know the nature of what they were selling. And it would have understood that requiring the Government to prosecute analogue cases under the exact same provision would have the same consequence.

In any event, the Government has not pointed to any actual evidence that it has been unduly hindered in prosecuting analogue cases in the jurisdictions that require proof that the defendant knew he was selling an analogue. In fact, it routinely convicts "street-level dealers" in those circuits. *See, e.g.*, *United States v. Sullivan*, 714 F.3d 1104, 1107 (8th Cir. 2013); *United States v. Bamberg*, 478 F.3d 934, 939-40 (8th Cir. 2007); *Turcotte*, 405 F.3d at 529-30; *United States v. Ansaldi*, 372 F.3d 118, 121 (2d Cir. 2004); *United States v. Haugen*, No. 12-305(2), 2014 WL 4722325, at *1 (Sep. 22, 2014 D. Minn.); *United States v. Ramos*, No. 13-CR-2034-LLR, 2014 WL 4437554, at *1 (N.D. Iowa Sept. 9, 2014); *United States v. Carlson*, No. 12-305, 2013 WL 6480744, at *1 (D. Minn. Dec. 10, 2013); *United States v. Toback*, No. 01-CR-410, 2005 WL 992004, at *1 (S.D.N.Y. Apr. 14, 2005); *see also* Brief for Appellee United States of America at 4-7, *United States v. Zhang*, No. 13-3410 (2d Cir. Sept. 19, 2014) (describing conviction and plea deals with multiple defendants in pending appeal).

As "in other drug cases, direct and circumstantial evidence, including evidence of the defendant's furtive conduct, can suffice to demonstrate that the defendant knew that the substance at issue was 'controlled.'" *United States v. Chin Chong*, 991 F. Supp. 2d 453, 456 (E.D.N.Y. 2014). For example, the defendant may have been involved in the production, or told by the producer that a substance is an analogue.[20] The Government can urge the jury to draw reasonable inferences from what defendant knows or says about effects. *Cf. Turcotte*, 405 F.3d at 527-28. And it can request that a jury be instructed that willful blindness or recklessness suffices to establish knowledge, as petitioner conceded in this case. *See* J.A. 30.

Moreover, there are a number of steps the Government can take to respond to any perceived difficulties that arise from applying an ordinary mens rea element to the Analogue Act.

For example, particularly in a case like this, where suspects are selling a product openly in a store or on the internet, the Government can inform the

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[20] At the time of enactment, it appears that the relationship between those who made and those who sold analogues was reasonably close. *See, e.g.*, Controlled Substance Analogs Enforcement Act of 1985: Hearing on S. 1437 Before the S. Committee on the Judiciary, 99th Cong. 9 (1985) (Senate Hearing) (statement of Sen. Hawkins) (noting that "there is no middleman" because the "synthetic drug operation is still in the hands of small entrepreneurs rather than under the control of organized crime"); *id.* at 37 (letter of Stephen Trott, Assistant Att'y Gen., Criminal Division) ("We have no indication at this time that organized crime has become involved in designer drug production or distribution.").

individuals that the substance they are selling is an analogue and prosecute them if they keep selling it. The Government should have had no difficulty persuading jury that a defendant who ignores such a warning knows he was selling an analogue. The DEA has apparently been willing to take this approach with some established retailers, if not individuals like petitioner. *See Chin Chong*, 991 F. Supp. 2d at 455 (noting testimony regarding the availability of one analogue "through Amazon.com and DEA outreach to large retailers").

If the Government prefers not to give defendants individualized notice of what it believes to constitute illegal analogues, the DEA may publish and publicize the list of analogues that it now keeps secret. *See* J.A. 58. Prosecutors can then ask the jury to draw the inference that the defendant was aware of (or willfully blind to) the facts disclosed in that publication.

And, of course, the DEA can invoke its emergency scheduling power to add new substances to the controlled substances schedules. *See* 21 U.S.C. § 811(h). Having done that, the Government need only prove that the defendant was aware of the chemical *identity* of what he was selling, not its chemical structure of effect. *See infra* Part II. The expedited process can be completed in as few as thirty days. 21 U.S.C. § 811(h)(1). And by all accounts (including the Government's) the DEA's use of that authority has been very effective in

combatting analogues over the years.[21] To be sure, Congress believed more was needed to get at clandestine chemists trying to keep one step ahead of the schedules. But as discussed, applying an ordinary mens rea element to Analogue Act offenses does not undermine that purpose.

Finally, nothing in petitioner's position prevents the Government from immediately protecting the public from alleged analogues by immediately seizing the analogues as contraband. *See* 21 U.S.C. § 881(a)(1). Under the federal drug forfeiture statute, the owner's ignorance of the true nature of the drugs in his possession is no defense. *Id.*

II. A Defendant Knows He Is Selling A Controlled Substance Analogue If He Knows (Or Is Willfully Blind To The Fact) That Substance Has The Characteristics Of An Analog As Defined By The Statute.

For the reasons just discussed, the district court erred in instructing the jury that the Government was required to prove only that petitioner intended the alleged analogues for human consumption. In

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[21] *See, e.g.*, House Report 4-5 ("In the Committee's view, generally this [emergency scheduling] authority has been used very effectively to address much of the designer drug problem."); Senate Hearing 21 (statement of Stephen Trott, Assistant Att'y Gen., Criminal Division) (emergency scheduling authority "addresses this problem and reduces the potential for abuse to a great extent"); Michael McLaughlin, *Bath Salts Incidents down Since DEA Banned Synthetic Drug*, Huffington Post (Sept. 4, 2012, 8:03 AM EDT), http://www.huffingtonpost.com/2012/09/04/bath-salts-ban_n_1843420.html.

addition, the district court erred in rejecting petitioner's proposed instruction, which defined what it meant to knowingly or intentionally distribute an analogue.[22]

1. The district court wrongly rejected petitioner's proposed instruction, which would have required the Government to prove that petitioner knew that the alleged analogues had a chemical structure, and an actual, intended or claimed effect, substantially similar to that of a schedule I or II controlled substance. *See* Pet. App. 21a; J.A. 29-30 (petitioner's proposed instructions).

As discussed, the Analogue Act incorporates Section 841(a)'s conventional mens rea element for analogue prosecutions. A "conventional mens rea element require[s] that the defendant know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 605 (1994). In the context of a scheduled controlled substance, that means that the defendant need only know the chemical name of what he is selling because the identity of the substance is the only criteria for its illegality. *See, e.g., United*

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[22] The two errors are independent grounds for reversal. *See* Fed. R. Crim. P. 30(d); *Jones v. United States*, 527 U.S. 373, 388 (1999); *see also* 2A WRIGHT & MILLER, 2A FED. PRAC. & PROC. § 484 & n.5 (4th ed. 2014) ("A party may object to an instruction given by the court although it has not requested an instruction of its own on the point.") (collecting citations). Accordingly, even if petitioner's proposed instruction were incorrect in some respect, that does not excuse the district court's error in omitting an essential element of the offense from the jury instructions. *See, e.g., United States v. Hurwitz*, 459 F.3d 463, 480 (4th Cir. 2006).

States v. Turcotte, 405 F.3d 515, 525-26 & n.2 (2005). In other words, because cocaine is expressly listed as a schedule I drug, and the CSA makes sale of schedule I drugs unlawful, knowing that a product contains cocaine is all a defendant needs to know to be on notice that its sale is illegal. *Id.*

However, the Analogue Act defines illegal analogues not by name, but by reference to their characteristics. *See* 21 U.S.C. § 802(32). Therefore, to decide whether selling a particular substance would be illegal, it is not enough to know the chemical's name; one must know its chemical structure and effects, and determine whether it is "substantially similar" in structure and effect to a controlled substance.

In this way, the Analogue Act is similar to other statutes that prohibit possession or sale of objects meeting certain criteria. For example, in *Staples v. United States* this Court considered a statute that prohibited unregistered possession of a machine gun. Rather than attempt to list all known machine guns by brand name and model, Congress defined a "machine gun" by reference to the weapon's characteristics – namely, its ability to fire multiple rounds upon a single pull of the trigger. 511 U.S. at 602 (describing 26 U.S.C. § 5845(a)(6), (b)). The Court explained that in such cases, under a conventional mens rea element, it is insufficient for the Government to prove that the defendant knew he possessed a gun that, unbeknownst to him, had the characteristics that made it a machine gun. Instead, the prosecution must "prove that [the defendant]

knew of the features of his AR-15 [rifle] that brought it within the scope of the Act." *Id.* at 619.[23]

The Court has applied the same principle to other statutes prohibiting knowing possession of objects having specified characteristics. *See Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009) (defendant must know means of identification belonged to another person); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 66 (1994) (defendant must know pornography involved minors); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524 (1994) (defendant must know product likely to be used with illegal drugs); *Morissette v. United States*, 342 U.S. 246, 271 (1952) (defendant must know that converted property belong to another); *cf. also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978) (criminal antitrust violation requires defendant know not only what conduct it engaged in, but also "of its probable consequences and having the requisite anticompetitive effects").[24]

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[23] As the Government has noted, BIO 13, in *Staples* the Court construed the scope of an implied, rather than express, mens rea element. But in doing so, the Court made clear it was implying a "conventional" mens rea requirement of the sort embodied in statutes that expressly criminalize only knowing conduct. 511 U.S. at 619; *see also Carter v. United States*, 530 U.S. 255, 269 (2000) (explaining *Staples* implied an ordinary "general intent requirement"). Indeed, it would be passing strange if an *implied* knowledge requirement were more demanding than an *express* one. *See id.* (explaining that courts should be parsimonious in implying mens rea elements).

[24] There are exceptions to the presumption, including with respect to "jurisdictional" elements that go to the forum for prosecuting the crime rather than the criminality of the act.

As applied to the Analogue Act, this requires that "the offender must have known or intended he was manufacturing, distributing, or possessing a substance that he knew or intended to have the characteristics of a controlled substance analog as defined" by the Act. Senate Report 4.[25] Accordingly, it is not enough that a defendant may know the chemical name of the substance he is selling, just as it was not enough in *Staples* that the defendant knew the name of the brand of rifle he had purchased. Instead, the "defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has [substantially] similar physiological effects or intend or represent that it has such effects." *Turcotte*, 405 F.3d at 527.[26]

This does not amount to "sanctioning a mistake-of-law defense." BIO 16. Once a person knows that a substance is substantially similar to a controlled

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See, e.g., *United States v. Feola*, 420 U.S. 671, 683-85 (1975). But no such exception applies here.

[25] The Government is correct (BIO 12 n.2) that the Senate Report discussed a prior version of the bill. That proposal established an independent analogue offense rather than directing that analogues be treated as schedule I controlled substances for purposes of existing law. *See* Senate Report 8-9. But the change in form is not material to the point here because both versions prohibited only knowing or intentional possession or distribution of analogues.

[26] As is true for ordinary controlled substance offenses, it is no defense that the defendant believes he is selling one analogue but is actually selling another (or an actual controlled substance). *See supra* n. 11.

substance, it is no defense that he was unaware of the Analogue Act or otherwise believed the possession of the analogue was lawful. *Cf., e.g., United States v. Barbosa*, 271 F.3d 438, 458 (3d Cir. 2001) (in an ordinary controlled substance case, the prosecution need not prove the defendant's "knowledge that the facts amount to illegal conduct").

2. The Government insists that someone who sells products "for use as recreational drugs" and "compares them to controlled substances" should "not be heard to complain that he is innocent simply because he did not know whether a jury would find his [products] to meet the statutory definition of an analogue." BIO 16.

To the extent the Government intends this as a defense of the Fourth Circuit's interpretation, it is a non sequitur. Neither the court of appeals' decision nor the jury instructions required the Government to prove that petitioner marketed a substance for recreational drug use or compared it to a controlled substance. All either required was that the defendant knew he was distributing *something* and that he intended it to be consumed by humans. Pet. App. 21a; J.A. 33-34, 40. On that interpretation, a Girl Scout unknowingly selling cookies adulterated with an analogue is a drug trafficker, too.

To the extent the Government means to propose a mens rea element under which it must prove the defendant's knowledge (or representation) of an alleged analogue's substantial similarity in *effect*, but not his knowledge of its substantial similarity in *chemical structure*, that suggestion has no basis in the text of the statute or legal tradition. As discussed, in combination, the text of Sections 813

and 841(a) requires the Government to prove that the defendant knowingly or intentionally distributed an analogue. That means the defendant must know enough about the chemical structure of the substance in question to know that it is *is* an analogue, not that it could *potentially* be an analogue. A defendant does not knowingly possess a machine gun simply because he knows that his rifle is capable of shooting bullets and, therefore, might be a machine gun, depending on how many bullets it can fire on a single trigger pull. *See Staples*, 511 U.S. at 609-12 (rejecting argument that Government should be required to prove only that defendant knew he was in possession of a "dangerous" weapon). And the Government cannot prove knowing possession of pornography involving minors simply by demonstrating that the defendant knew a film was sexually explicit; it must show that the defendant was aware of the age of the participants. *See X-Citement Video*, 513 U.S. at 66.

Any interpretation that excused the Government from proving the defendant's knowledge of structural similarity would also run counter to the traditions and presumptions discussed above. Under the statute, chemical similarity is an essential element of the crime. Congress knew that many substances – including caffeine and alcohol – can have an *effect* substantially similar to some controlled substances, particularly when taken in large quantities. *See* House Report 7. It determined, however, the prohibit only those substances that had such effects because they were made through small alterations to an existing controlled substance. Thus, the House rejected a proposal that would have allowed conviction even if a substance was not structurally similar to an existing controlled

substance, so long as the "substance had been 'specifically designed' to produce an effect 'substantially similar' to that of a controlled substance in scheduled I or II." *Id.* 6.

Any interpretation that relieved the Government of its burden to proven knowledge of structural similarity thus would fail to extend the express mens rea requirement incorporated by the statute to every element of the offense. *See Flores-Figueroa*, 556 U.S. at 650. It would allow conviction of a defendant who was unaware of one of the "facts that make his conduct illegal." *Staples*, 511 U.S. at 605. And it thus would fail to ensure that the defendant was aware of an essential fact "necessary to separate wrongful conduct from otherwise innocent conduct." *Carter*, 530 U.S. at 269 (citation omitted).

To be sure, some may deem the marketing of substances intended to produce altered psychological states unseemly, or even dangerous and immoral. But the same could be said of the sale or possession of false identifications, machine guns, drug paraphernalia, and pornography. Yet this Court has not hesitated to apply traditional mens rea principles to criminal statutes banning possession or sale of those items. *See Flores-Figueroa*, 556 U.S. at 652-53; *Staples*, 511 U.S. at 605; *Posters 'N' Things*, 511 U.S. at 522-24; *X-Citement Video,* 513 U.S. at 72. Even setting aside the difficulties in administering an interpretative rule that depends on a court's views on the social desirability of particular conduct, consistent and uniform application of the Court's settled mens rea presumptions is necessary to provide "legislators a predictable background rule

against which to legislate." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994).

III. Petitioner's Interpretation Of The Statute Is Necessary To Save The Statute From Constitutional Infirmity.

Requiring the Government to prove that the defendant was aware of the substantial similarity between the alleged analogue and a controlled substance is further required to avoid casting grave doubt on the Analogue Act's constitutionality. *See, e.g.*, *Jones v. United States*, 529 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (citations omitted).

A. As Construed Below, The Analogue Act Is Unconstitutionally Vague.

The Due Process Clause requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This fair warning requirement protects a person's right to "steer between lawful and unlawful conduct," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), by insisting that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (citation omitted).

Relatedly, a statute may not be so broad and unconstrained as to "encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at

357. Vague laws leave the line between lawful and illegal conduct to be drawn "on an ad hoc and subjective basis" by those who enforce the statute, inevitably leading to disparate treatment of similarly situated defendants based on the happenstance of the understanding adopted by particular police officers, prosecutors, judges, and juries. *Id.* at 109.[27]

Finally, vague laws implicate separation of powers concerns by "impermissibly delegat[ing] basic policy matters to policemen, judges, and juries for resolution." *Grayned*, 408 U.S. at 108-09.[28]

The Analogue Act gives rise to all of these constitutional concerns in spades. In fact, as construed by the Fourth Circuit, the statute is unconstitutionally vague as applied to petitioner's case and many others like it.

1. As Construed, The Statue Fails To Provide Fair Notice Of What The Law Forbids.

As the Government effectively admits, *see* BIO 15-16, it is all but impossible for someone like

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[27] The risk of arbitrary treatment is not limited to criminal prosecutions – vague criminal statutes allow law enforcement broad discretion to seize cash and other property under drug forfeiture laws. *See generally, e.g.*, Marian R. Williams, et al., Institute for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture (March 2010), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

[28] Vague statutes also empower prosecutors to make charging decisions based on aggressive readings of vague statutes that impose severe penalties, increasing their negotiating "leverage" with defendants. BIO 15.

petitioner to discern whether a particular substance meets the statutory definition of an analogue. After all, the only way the Government can make that determination itself – in deciding whom to arrest and in attempting to prove the case in court – is by relying on expert scientists who, in turn, require expensive lab equipment (like mass spectrometers), subscriptions to databases of scientific literature, and of course years of technical training and experience. *See, e.g.*, C.A. J.A. 466-74 (DEA expert describing process for reaching opinion).

An ordinary citizen attempting to answer those same questions faces daunting obstacles at every turn. To start, the *information* required to apply the statute is inaccessible to most people. One must know all the chemicals in the product possessed or sold, which for things like diet supplements, energy drinks, homeopathic remedies, or aroma therapy products, can be a lot. Absent complete and truthful labeling (which is not required of many products), this could require a mass spectrometer or equipment similarly unavailable to the average person. And even then, laboratory testing would only disclose the chemical names of the substances. *See, e.g.*, C.A. J.A. 722 (DEA lab report in this case). To know if it is an analogue, one must also know the substances' chemical structure, *e.g.*, the arrangement of atoms and the nature of the bonds between them. And not just the structure of the substance the defendant wants to sell, but also the structure of every one of the more than 200 schedule I or II substances to which a government chemist might compare it. *See* 21 C.F.R. pt. 1308

Even that is harder than it sounds (and it already sounds pretty difficult). Someone like petitioner would have to know not only what the relevant substance's *actual* chemical structure is, but he must also somehow discern what aspects of that structure are *material*. The DEA's expert in this case acknowledged, for example, that the chemical charts he used to judge structural similarity disregarded all carbon and hydrogen atoms, explaining that they made the schematics "very, very busy" and "too hard to decipher." C.A. J.A. 425. He stated that [a]s a chemist," he knew that this aspect of the structure did not matter. *Id.* Likewise, he testified that other kinds of seemingly substantial differences in the schematics of substances "may be deceiving" to a lay person but a chemist knows the difference "has no structural meaning." *Id.* 439.

The Government's expert thus all but acknowledged that there would be no way for lay person to make the *factual* determinations the statute requires. But even if someone like petitioner did somehow work out the relevant structural features of a substance and all potentially comparable controlled substances, he would then be faced with the *legal* question of whether the structures are "substantially similar" within the meaning of the statute. There is a reason criminal laws generally do not prohibit possession of "machine guns or substantially similar weapons" and why serious vagueness concerns arise from a statute that increases penalties based on a prior conviction that "otherwise involves conduct that presents a serious

potential risk of physical injury to another."[29] To begin with, the word "substantially" is inherently vague. Nothing in the statute gives it any further substance, and the experts at trial agreed (and others have confirmed), that the term "substantially similar" has no scientific meaning. *See* C.A. J.A. 455, 524; *United States v. Forbes*, 806 F. Supp. 232, 237 (D. Colo. 1992). Accordingly DEA officials have acknowledged to Congress that the "threshold for 'substantially similar' is subjective and may differ from expert to expert."[30]

The Court has recognized that such ambiguous line-drawing along a gradient – while sometimes tolerable in civil statutes and sufficient to provide a basis for further elaboration by administrative regulations[31] – can render a criminal statute unconstitutionally vague. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 59 (1999) (plurality opinion) (statute criminalizing failure, upon police order, to remove oneself "from the area" unconstitutionally vague because it leaves to speculation "[h]ow far must [one] move?"); *Connally v. Gen. Constr. Co*, 269 U.S. 385, 395 (1926) (statute criminalizing failure to pay daily wage prevalent in nearby "locality" requires

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[29] 18 U.S.C. § 924(e)(2)(B)(ii); *see* Order for Supplemental Briefing and Reargument, *Johnson v. United States*, No. 13-7120 (Jan. 9, 2015).

[30] Lisa N. Sacco & Kristin Finklea, Cong. Research Serv., *Synthetic Drugs: Overview and Issues for Congress* 16 (2014), *available at* http://fas.org/sgp/crs/misc/R42066.pdf.

[31] *See Vill. of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 463-64 (1927) .

defendants to guess "[h]ow near" two places must be to exist in the same locality); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927) (statute criminalizing certain business combinations unless a "reasonable profit" cannot otherwise be obtained unconstitutionally vague); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (statute making it a crime to charge an "unjust or unreasonable rate" provides no "ascertainable standard of guilt").

Not only is it unclear how *much* similarity is enough to be "substantial," but the "scientific community cannot even agree on a methodology to use to determine structural similarity." *Forbes*, 806 F Supp. at 237. Scientists *do* agree that one cannot simply count up the number of differences in the atomic structure of two molecules. The experts in this case, for example, testified that changes in a small number of atoms could have either a dramatic difference on the substance's effects on the human body, or none at all. *See* C.A. J.A. 431-32, 526, 535. So the question is what *kinds* of molecular changes are relevant and how significant particular changes are.

And on *that* question, scientists have been unable to reach any agreement, fundamentally because it is not a *scientific* question, but a *legislative* choice Congress failed to make. Nothing in science tells a chemist (much less an ordinary citizen) whether substituting an alkyl group on a phenethylamine core, rather than adding an extra carbon atom between a phenyl ring and nitrogen atom, makes two chemicals "substantially similar" in

chemical structure.[32] Indeed, scientists disagree even on the basic question of whether to compare chemical structure in two dimensions or three. In this case, the DEA's expert used two-dimensional schematics. C.A. J.A. 574. Dr. Lee, however, explained that two chemicals that look similar in two-dimensions may actually be very different in three dimensions (just as an orange looks like a Frisbee in two dimensions, but not in three, C.A. J.A. 525). And, critically, he explained that those differences in the third dimension can dramatically affect a substance's effect on the body, *id.* at 525-28.

This is not simply a matter of disagreement among hired gun expert witnesses. In 2012, the Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) – a group co-founded by the DEA itself – formed a subcommittee to explore making recommendations for forensic scientists analyzing alleged analogues.[33] In August 2014, almost thirty years after the Analogue Act was passed, the group produced three pages of recommendations.[34] Despite initial proposals that the group develop guidelines for judging substantial similarity,[35] the final document

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[32] *See* C.A. J.A. 426-27, 431 (Dr. DiBerardino).

[33] *See* SWGDRUG Meeting Minutes, Portland, ME, July 10-12, 2012, *available at* http://www.swgdrug.org/Documents/SWGDRUG%20Meeting%20Minutes%20July%202012.htm.

[34] *See* SWGDRUG Recommendations, 26-28 (version 7.0, Aug. 14, 2014), *available at* http://www.swgdrug.org/Documents/SWGDRUG%20Recommendations%20Version%207-0.pdf.

[35] *See* SWGDRUG Meeting Minutes, *supra* n. 33 (notes of July 12, 2012 meeting).

simply noted that "the requirements for legal consideration as a controlled substance analogue are defined in jurisdictional legislation."[36] With admirable frankness, however, the paper acknowledged that "[e]valuation of similarity is a subjective matter and opinions may differ."[37] Another group, the Advisory Committee for the Evaluation of Controlled Substance Analogs, has likewise attempted[38] but failed[39] to develop any substantial guidance on the question.

It should be no surprise, therefore, that even scientists frequently disagree about whether particular substances meet the statutory definition. A DEA official testified before Congress that substantial similarity is "by its nature an 'opinion' and therefore subject to opposing views from other expert chemists."[40] Indeed, although the DEA obviously has no interest in publicizing internal disagreements among its scientists, disputes within the DEA's own laboratories have surfaced in some cases. *See United States v. Nashash*, No. 12-CR-778, 2014 WL 169743, at *1 (S.D.N.Y. Jan. 15, 2014)

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[36] SWGDRUG Recommendations, *supra* note 34, at 26.

[37] *Id.* at 27.

[38] *See* http://www.druganalogs.org/mission.html.

[39] *See* http://www.druganalogs.org/subcommittees.html.

[40] *Bioterrorism, Controlled Substances, and Public Health Issues: Hearing Before the H. Subcomm. on Health, Comm. on Energy and Commerce*, 112th Cong. 17 (July 21, 2011) (statement of Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, DEA), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73892/pdf/CHRG-112hhrg73892.pdf.

(noting that defendant seeking discovery regarding DEA analysis of alleged analogues cited "an internal DEA email where a special forensics lab concluded that [the alleged analogues] are not substantially similar in structure and are not Analogues"); *Forbes*, 806 F Supp. at 237 (noting defendant was prosecuted despite fact that the "government's own chemists cannot agree" on whether the substance at issue met the "substantial similarity" test); Exhibit 2, Motion to Compel Production of *Brady* Material, Docket No. 90, *United States v. Fedida*, No. 12-CR-209 (M.D. Fla. July 11, 2013) (letter from Department of Justice to criminal defendant acknowledging dispute among DEA chemists regarding whether charged substance was an analogue), *available on Pacer*.

Finally, the courts have been unable to resolve these statutory deficiencies in their limited role applying deferential review to jury fact-finding. *See, e.g.*, Pet. App. 22a-27a (applying deferential standard of review); *id.* 23a (emphasizing that an "appellate court is not the proper forum to refight a battle of expert witnesses") (citation omitted); Amicus Br. of National Assoc. Crim. Defense Lawyers.

At bottom, Congress has enacted a statute under which a "substance's legal status as a controlled substance analogue is not a fact that a defendant can know conclusively *ex ante*; it is a fact that the jury must find at trial." *United States v. Turcotte*, 405 F.3d 515, 526 (7th Cir. 2005). Even worse, it is a fact a jury can find at trial *only* on the basis of expert testimony from scientists who cannot agree even on the basic framework for deciding the question, while employing technology and skills beyond the reach of ordinary people like petitioner. To top it all off, the

jury's conclusion is then used to impose retroactive criminal punishment on a defendant for conduct occurring well before his trial.

The Analogue Act thus bears all the markings of an unconstitutionally vague statute. *See, e.g.*, *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966) (Due Process Clause prohibits a law whose meaning can be determined only on a "case to case basis"); *Lanzetta v. New Jersey*, 306 U.S. 451, 453-55 (1939) (due process violated when critical term of criminal statute had no settled meaning in legal tradition, dictionaries, or social science); *L. Cohen Grocery*, 255 U.S. at 91 (vagueness indicated by efforts "made by administrative officers to establish a standard of their own to be used as a basis to render the [statute] capable of execution"); *id.* at 90 & n.2 (lower courts' inability to reach consensus on meaning of law's strong evidence of unconstitutionality); *cf. Sykes v. United States*, 131 S. Ct. 2267, 2286-87 (2011) (Scalia, J., dissenting) (asking "is it seriously to be expected that the average citizen would be familiar with the sundry statistical studies" underlying the Court's interpretation of the ACCA's residual clause).[41]

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[41] While petitioner has focused on the vagueness of the requirement of substantial similarity in chemical structure, similar problems can arise with respect to similarity in effect. How, for example, is a law-abiding citizen to know whether a dietary supplement advertised as boosting energy has a substantially similar stimulant effect to a controlled substance she cannot legally try herself? The DEA's expert was able to form an opinion in this case only through an examination of scientific literature inaccessible (and likely incomprehensible) to ordinary people. C.A. J.A. 466-75.

2. *As Construed, The Statute Risks Arbitrary Law Enforcement.*

The unavoidable vagueness of the statutory terms likewise violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358. The risk of arbitrary and discriminatory treatment is heightened by the fact that the ultimate arbiter of whether a particular substance is an analogue is the factfinder in each criminal case, ordinarily a lay jury.

For one thing, assigning that task to the factfinder unavoidably makes the lawfulness of any given substance subject to determination "on an ad hoc" and "case to case basis." *Grayned*, 408 U.S. at 109; *Ashton*, 384 U.S. at 198. This risks the law meaning one thing for one defendant, and another thing for someone else. *Compare, e.g.*, *Turcotte*, 405 F.3d at 524 (jury found that 1,4 Butanediol was not an analogue) *with United States v. Brown*, 279 F. Supp. 2d 1238 (S.D. Ala. 2003) (court in bench trial concluding that same substance was an analogue); *compare also McKinney v. United States*, 221 F.3d 1343 (8th Cir. 2000) (unpublished table decision) (successful prosecution of defendant for possession of phenethylamine), *and United States v. Nunez*, 57 Fed. Appx. 776, 776 (9th Cir. 2003) (same), *with* J.A. 424 (DEA expert in this case testifying that phenethylamine is *not* an analogue). And the resulting arbitrariness is distinctly lopsided: if a defendant loses the debate before a jury, he goes to jail; if the Government loses, it can always try again with another jury in another prosecution.

In addition, the very nature of the complex scientific debate risks arbitrary results from inexpert

jurors who may or may not understand, or be capable of critically evaluating, the disagreements among scientists on matters of chemistry and biology. Unconstrained by the law and unable to fully understand the science, jurors may be left "to pursue their personal predilections," *Kolender*, 461 U.S. at 358 (citation omitted), basing their verdict (consciously or not) on their views of whether the defendant was engaged in unsavory, rather than illegal, conduct.

3. As Construed, The Statute Raises Grave Separation Of Powers Concerns.

The Analogue Act's vagueness also implicates the Constitution's division of powers among the branches, effectively assigning legislative powers to courts, juries, and the experts upon which both must rely.

The statutory vagueness arises from Congress's fundamental failure to make the legislative decisions necessary to implement the law. For example, as noted, an essential vagueness in the statute arises from its failure to identify in what respect two chemicals must be structurally similar and how much similarity is enough. In practice, the statutory gap is filled by what is essentially a *legal* interpretation adopted by expert witnesses in the course of answering what is portrayed as a *factual* question within his or her expertise. In this case, for example, Dr. DiBerardino testified he concluded one of the substances at issue here were alleged analogues because it had a phenethylamine core with substitutions involving "the types of chemical moieties that are similar to those found in the schedules." C.A. J.A. 454. He acknowledged that

this definition of substantial similarity was "not found in the statute." *Id.* And when asked whether there is "a scientifically commonly understood definition to substantially similar," he answered "I don't think so, no." *Id.* 455. Of course, a jury might reject the prosecution expert's implicit legal interpretation and adopt instead the defense expert's, or come up with one of its own. But that just proves the point – whoever is making the decision, it is not Congress.[42]

"Fuzzy, leave-the-details-to-be-sorted-out-by-the-*courts* legislation" is bad enough. *See Sykes*, 131 S. Ct. at 2288 (Scalia, J., dissenting) (emphasis added). It may require judicial application of the statute to one factual context after another "until the cows come home," id. at 2287, but at least judicial decisions bind the Government in the next case and gradually put the public on notice of what the law requires. Leaving the details to be sorted out by chemists and jurors in one-off decisions is an abdication of legislative responsibility the Constitution should not tolerate.

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[42] Of course, Congress may delegate some policy decisions to an administrative agency, either by requiring it to elaborate the statutory language through regulations or, as it did under the CSA, by charging the agency with identifying the products subject to the statute, *see* 21 U.S.C. § 811(a). But Congress self-consciously avoided that route to clarity, notice, and even-handed application of the law when it enacted the Analogue Act.

B. A Robust Mens Rea Element Would Help Mitigate The Statute's Vagueness.

For the foregoing reasons, the Analogue Act as construed by the Fourth Circuit is unconstitutionally vague as applied to individuals like petitioner, because it permits conviction of defendants who do not know, and cannot reasonably be expected to discover, whether the substances they possess are illegal analogues under the statute's inscrutable definition.

That does not, however, mean that the Court must declare the statute unconstitutional, on its face or even as applied to petitioner. The Court "has recognized that a scienter requirement may mitigate [a] law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499; *see also, e.g.*, *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952). In 1985, when members of Congress worried about the vagueness of the proposed Analogue Act, the Department of Justice thus assured them that "the constitutionality of a standard challenged as vague is closely tied to whether the standard incorporates a specific intent requirement," and that the bill the Department supported required that "the offense must be committed knowingly or intentionally." Senate Hearing 29 (statement of Stephen Trott, Assistant Att'y Gen., Criminal Division).

Construed to contain a conventional mens rea element, the Analogue Act may well pass constitutional muster in its core application against chemists who set out to design substances that mimic the effects of a controlled substance through small

alterations in chemical structure. At the same time, that construction of the statute should preclude conviction of many for whom the law is hopelessly indecipherable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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